Filed 4/8/10 P. v. Valencia CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FRED VALENCIA,

Defendant and Appellant.

2d Crim. No. B215467
(Super. Ct. No. 2008041795)
(Ventura County)

Fred Valencia appeals his conviction by jury of possession of cocaine (count 1, Health & Saf. Code, § 11350, subd. (a)); misdemeanor driving under the influence of alcohol or drugs, (count 2, Veh. Code, § 23152, subd. (a)); and misdemeanor driving with a blood alcohol content of .08 percent or more (count 3, *Id.*, subd. (b)). The jury found true the special allegations as to counts 2 and 3 that appellant had a blood alcohol content of .15 percent or more (Veh. Code, § 23578).

The information alleged that appellant had a prior conviction for driving under the influence of alcohol (Veh. Code 23152, subd. (a)) and had served a prior prison term (Pen. Code, § 667.5, subd. (b)).[1] Appellant waived his right to a jury trial on the prior prison term allegation, but the court made no express findings as to its truth. The trial court imposed an aggregate term of 3 years in state prison, consisting of the mid-

[1] All further statutory references are to the Penal Code unless otherwise stated.

term of 2 years on count one, a concurrent term of 134 days for time served on counts two and three, plus a one-year enhancement for the prior prison term allegation. (§ 667.5, subd. (b).)[2]

Appellant argues that the trial court abused its discretion by excluding evidence of third party culpability, denying probation, and imposing a prior prison term enhancement, although the allegation was not proved. We affirm, but vacate the sentence, and remand the matter for resentencing or (at the prosecutor's election) retrial of the prior prison term allegation.

FACTS

On October 7, 2008, appellant was seen driving a white Dodge Grand Caravan through a residential area in Simi Valley. At approximately 8:15 a.m., he hit another car, then immediately threw his van into reverse. He made a U-turn and began driving quickly and erratically in the opposite direction. A motorcycle officer stopped appellant and arrested him for being under the influence of alcohol.

Police Officers Sheylan Flannery and Thomas Meyer began their shift at approximately 6:00 a.m. on the morning of the offense. At 8:30 a.m., they arrived at the scene to transport appellant to the Ventura County Jail. He was sitting on the curb, with his hands cuffed behind his back. His eyes were watery, his pupils were dilated and he smelled strongly of alcohol. Appellant later provided two breath samples that showed a blood alcohol content of .17.

Flannery searched appellant's pockets and ran his hand across appellant's entire body to check for weapons. He did not check his shoes. Flannery searched the rear of the police car with a flashlight to be sure it was clear of any type of contraband. He then placed appellant on the rear passenger side of the car, fastened his seatbelt, and drove him to jail.

During the 10- to 15-minute ride, appellant moved continuously in the back seat by shifting his body back and forth. He continually kicked the rear plate separating

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[2] At sentencing in the present case, appellant pleaded guilty to a probation violation in another matter, and the trial court sentenced him to a concurrent 90-day term.

the officers from the arrestees. Meyer felt appellant kicking the area beneath his (passenger) seat, and looked back and saw him leaning toward the driver's side at an angle. After reaching the jail, Flannery removed appellant from the patrol car. The officers noticed that the back of appellant's shoes were collapsed and folded inward. Meyer immediately conducted a search of the patrol car. He saw a small trail of white powder leading to a baggie containing .92 grams of cocaine. It was located in the rear passenger side of the car, where appellant's feet had been.

Earlier that morning, between 7:15 a.m. and 8:00 a.m., Flannery had placed a handcuffed female in the rear driver side of his patrol car, opposite the location where the narcotics were found. Before putting her in the car, Flannery patted her down for weapons and checked her pockets. He did not perform as thorough a search as he would have done for a male suspect. She was in the car for about 15 minutes, while the officers waited for an additional unit to arrive to transport her to jail. Flannery stood by the door and watched her during this time, and did not see her make any furtive movements. Meyer searched the car after the woman was removed and found nothing.

DISCUSSION

Third Party Culpability

The People's theory at trial was that appellant had cocaine hidden in his shoe, which he discarded in the patrol car en route to jail. The defense argued that the cocaine could have been placed in the vehicle by the female arrestee who was in the car earlier that morning. The People moved in limine to exclude evidence of third party culpability under Evidence Code section 352. The record does not reflect the trial court's ruling.

Before the jury had begun deliberating, the trial court went off the record to inform counsel that a juror had asked why the female had been arrested. Over defense objection, the court indicated it would take judicial notice that there had been a warrant for her failure to appear in court. Defense counsel made an oral motion to admit evidence of third party culpability. He requested the court to admit evidence of the female arrestee's name, and the fact that her failure to appear concerned the commission

of a drug-related offense. The trial court denied the motion. Citing Evidence Code section 352, it stated, "[T]here's just no foundation whatsoever to suggest that she had any culpability. And just because you know the name of the previous person in [the patrol car], you don't get to suggest or imply something that there's no way to rebut. And it's [an] undue consumption of time and so forth."

Appellant claims the court abused its discretion under Evidence Code section 352 by excluding this evidence. He asserts that the jury's inquiry about the crime for which the woman was arrested indicated it had some doubt as to whether appellant possessed the cocaine.

A trial court's exclusion of evidence of third party culpability is reviewed for an abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 577-578.) Such evidence is admissible if it is capable of raising a reasonable doubt as to a defendant's guilt. (*People v. Lewis* (2001) 26 Cal.4th 334, 372.) "'[T]o be admissible, evidence of the culpability of a third party . . . must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.' [Citations.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368.) Evidence of a person's motive or opportunity to commit the crime without more, will not suffice to raise a reasonable doubt. (*Lewis*, at p. 372.)

While being transported to jail, appellant continually kicked the partition and moved his feet beneath the front passenger seat. A baggie of cocaine was found under the seat, within moments after appellant was removed from the car. His shoes were pushed in at the heel. Meyer searched the car after the female arrestee was removed and Flannery searched it before appellant was placed in the back seat, and found nothing. There was no evidence linking the female to the crime. Admission of her name and criminal history would not have raised a reasonable doubt as to appellant's guilt. There was no abuse of discretion.

Denial of Probation and Prior Prison Term Allegation

Appellant claims the trial court abused its discretion by denying his request for probation. He contends the court had a personal bias concerning the treatment of drug addicts and considered facts not proven at trial. Appellant also asserts that we must strike his one-year section 667.5 subdivision (b) enhancement.

At the close of evidence, appellant waived jury trial on his prior prison term allegation and prior drug-related conviction allegation. At sentencing, the People argued for the midterm of two years and a one-year enhancement for the section 667.5 subdivision (b) allegation. The court agreed, and stated, "Probation is denied. [¶] And he is given two years plus the (b) prior for a total of three years . . . . [¶] Counts 2 and 3, probation is denied. He's ordered to serve 134 [days] with credit for 134 [days] at any penal institution . . . ."

After the pronouncement of sentence, the court invited appellant to comment. He argued that he was entitled to the low term, and the court responded that it was following the sentencing recommendation in the probation report. The court stated, "I've given you the regular, ordinary term, and you've been to prison before, so I add a year." Appellant said, "I've only been--I only have two felonies on my record." The court responded, "Oh, felonies, come on. How many times have you used dope that we don't even know about? How many times have you done little scams on people to get loaded that wasn't fair to them? You know in your heart what's going on here." Appellant answered that, if he was a drug user, the court should instead have ordered him into a treatment program. The court responded, "Programs don't fix anybody. . . . [¶] . . . About ten percent of the time they work. The public thinks that we can magically fix drug addicts. I know an awful lot about drug addicts, more than you know I know. I know the chance of fixing drug addicts is about ten percent, and that means somebody who acknowledges that they're drug addicts and that they do things that are bad, and you're not inclined to do that."

Probation is not a right, but an act of clemency to allow rehabilitation. (*People v. Johnson* (1993) 20 Cal.App.4th 106, 109; *People v. Superior Court (Du)*

(1992) 5 Cal.App.4th 822, 831.) An order granting or denying probation rests within the discretion of the trial court. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.) On appeal, "'[o]ur function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.'" (*Ibid*.)

According to the probation report, appellant was not suitable for probation because he had a significant criminal record and his performance on prior grants of probation and parole were unsatisfactory. It listed five factors in aggravation and none in mitigation. The trial court's statements do not reflect that it considered facts outside the record. The court properly exercised its discretion to achieve legitimate sentencing objectives. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Appellant next asserts that no evidence was submitted to prove the section 667.5, subdivision (b) allegation, nor did the court make any findings that it was true. "Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]" (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) The sentencing enhancement may not be imposed unless it is "charged and admitted or found true . . . ." (§ 667.5, subd. (d).) The prosecutor must prove each element of a sentence enhancement beyond a reasonable doubt. (*Tenner,* at p. 566.)

The People assert that the enhancement was properly imposed for the following reasons: appellant waived jury trial on his prior prison term allegation and admitted at sentencing that he had two felonies on his record. In making its sentencing decision, the court relied on the probation report that stated appellant had served a prior prison term. While calculating appellant's sentence the court stated, ". . . you've been to prison before, so I add a year." Further, the minute order states that "the court finds prior 667.5[, subdivision] (b) [of the Penal Code] charged and found true."

The People's argument is without merit. Appellant's decision to waive jury trial does not relieve the People of their burden to prove the allegation. His statement at sentencing that he had two felonies was made in response to the court's invitation that he comment upon the sentence imposed. It was not an admission that he had served a prior prison term. The court's statements--that it was following the sentencing recommendation in the probation report, and that it was adding one year to appellant's sentence because he had been to prison--do not constitute findings.

The minute order does not establish that the trial court made true findings. It is merely a clerical document reflecting the court's ruling. In this case, the minute order was inaccurate. The transcript of the sentencing hearing reflects that the People submitted no proof of the four factors listed in *Tenner,* and the court made no findings of any kind.

DISPOSITION

The judgment of conviction on the prior offense and imposition of the 667.5, subdivision (b) enhancement is reversed and the sentence is vacated. The case is remanded for a retrial on the prior conviction allegation if the People so elect, or for a new sentencing hearing if the People do not go forward on those allegations. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

John E. Dobroth, Judge

Superior Court County of Ventura

Christina J. Alvarez, under appointment by the Court of Appeal, for Defendant and Appellant.

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